

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

U.S. BANK AS TRUSTEE FOR GSAA)
HOME EQUITY TRUST 2006-9, ASSET-)
BACKED CERTIFICATES, SERIES 2006-9,)

Case No.: 2:15-cv-01177-GMN-NJK

Plaintiff,

ORDER

vs.

DIAMOND CREEK HOMEOWNERS')
ASSOCIATION; UNDERWOOD)
PARTNERS LLC; NV EAGLES LLC; DOE)
INDIVIDUALS I-X, inclusive, and ROE)
CORPORATIONS I-X, inclusive,)

Defendants.

Pending before the Court is the Motion to Dismiss, (ECF No. 88) filed by Defendant Diamond Creek Community Association ("HOA"). Plaintiff U.S. Bank ("Plaintiff") filed a Response, (ECF No. 90), and HOA filed a Reply, (ECF No. 91).

Also pending before the Court is the Motion for Summary Judgment, (ECF No. 92), filed by Defendant NV Eagles, LLC ("NV Eagles"). Plaintiff filed a Response, (ECF No. 94), and NV Eagles filed a Reply, (ECF No. 96).

Also pending before the Court is the Motion for Summary Judgment, (ECF No. 106), filed by Plaintiff. HOA and NV Eagles filed Responses, (ECF Nos. 107, 108), and Plaintiff filed a Reply, (ECF No. 109). For the reasons discussed below, the Court **GRANTS** Plaintiff's Motion and **DENIES** Defendants' Motions.

I. BACKGROUND

Plaintiff filed its Complaint on June 22, 2015, and its Amended Complaint, (ECF No. 51), asserting claims involving the non-judicial foreclosure on real property located at 9426 Cormorant Lake Way, Las Vegas, Nevada 89178 (the "Property"). (Am. Compl. ¶ 9). On

1 February 21, 2006, Garrett C. Pattiani purchased the Property by way of a loan in the amount of
2 \$284,360.00 secured by a Deed of Trust (“DOT”) recorded February 1, 2006. (*Id.* ¶ 14).

3 On August 9, 2010, HOA, through its agent, Alessi & Koenig, LLC, recorded a notice of
4 delinquent assessment lien. (*Id.* ¶ 21). On November 5, 2010, HOA recorded a notice of
5 default and election to sell to satisfy the delinquent assessment lien. (*Id.* ¶ 22). After recording
6 three notices of trustee’s sale, on May 3, 2013, Underwood Partners, LLC, (“Underwood”)
7 purchased the Property at the foreclosure sale pursuant to NRS § 116.1113. (*Id.* ¶ 36).
8 Underwood subsequently transferred its interest in the Property to NV Eagles. (*Id.* ¶ 38).

9 Plaintiff asserts the following causes of action against various parties involved in the
10 foreclosure and subsequent sales of the Property: (1) quiet title with a requested remedy of
11 declaratory judgment; (2) breach of Nevada Revised Statute (“NRS”) 116.1113; (3) injunctive
12 relief; and (4) violation of procedural due process. (*Id.*).

13 **II. LEGAL STANDARD**

14 The Federal Rules of Civil Procedure provide for summary adjudication when the
15 pleadings, depositions, answers to interrogatories, and admissions on file, together with the
16 affidavits, if any, show that “there is no genuine dispute as to any material fact and the movant
17 is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Material facts are those that
18 may affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).
19 A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to
20 return a verdict for the nonmoving party. *Id.* “Summary judgment is inappropriate if
21 reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict
22 in the nonmoving party’s favor.” *Diaz v. Eagle Produce Ltd. P’ship*, 521 F.3d 1201, 1207 (9th
23 Cir. 2008) (citing *United States v. Shumway*, 199 F.3d 1093, 1103–04 (9th Cir. 1999)). A
24 principal purpose of summary judgment is “to isolate and dispose of factually unsupported
25 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

1 In determining summary judgment, a court applies a burden-shifting analysis. “When
2 the party moving for summary judgment would bear the burden of proof at trial, it must come
3 forward with evidence which would entitle it to a directed verdict if the evidence went
4 uncontroverted at trial. In such a case, the moving party has the initial burden of establishing
5 the absence of a genuine issue of fact on each issue material to its case.” *C.A.R. Transp.*
6 *Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citations omitted). In
7 contrast, when the nonmoving party bears the burden of proving the claim or defense, the
8 moving party can meet its burden in two ways: (1) by presenting evidence to negate an
9 essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
10 party failed to make a showing sufficient to establish an element essential to that party’s case
11 on which that party will bear the burden of proof at trial. *Celotex Corp.*, 477 U.S. at 323–24. If
12 the moving party fails to meet its initial burden, summary judgment must be denied and the
13 court need not consider the nonmoving party’s evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S.
14 144, 159–60 (1970).

15 If the moving party satisfies its initial burden, the burden then shifts to the opposing
16 party to establish that a genuine issue of material fact exists. *Matsushita Elec. Indus. Co. v.*
17 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,
18 the opposing party need not establish a material issue of fact conclusively in its favor. It is
19 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
20 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
21 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid
22 summary judgment by relying solely on conclusory allegations that are unsupported by factual
23 data. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go
24 beyond the assertions and allegations of the pleadings and set forth specific facts by producing
25 competent evidence that shows a genuine issue for trial. *Celotex Corp.*, 477 U.S. at 324.

1 At summary judgment, a court’s function is not to weigh the evidence and determine the
2 truth but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. The
3 evidence of the nonmovant is “to be believed, and all justifiable inferences are to be drawn in
4 his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not
5 significantly probative, summary judgment may be granted. *Id.* at 249–50.

6 **II. DISCUSSION**

7 Plaintiff asserts claims against Defendants for quiet title, violation of NRS § 116.1113,
8 injunctive relief, and violation of procedural due process. The Court first considers the impact
9 of the Ninth Circuit’s ruling in *Bourne Valley Court Trust v. Wells Fargo Bank, NA*, 832 F.3d
10 1154 (9th Cir. 2016), *cert. denied*, No. 16-1208, 2017 WL 1300223 (U.S. June 26, 2017),
11 before turning to Plaintiff’s individual claims.

12 **A. The Scope and Effect of *Bourne Valley***

13 In *Bourne Valley*, the Ninth Circuit held that NRS § 116.3116’s “‘opt-in’ notice scheme,
14 which required a homeowners’ association to alert a mortgage lender that it intended to
15 foreclose only if the lender had affirmatively requested notice, facially violated the lender’s
16 constitutional due process rights under the Fourteenth Amendment to the Federal Constitution.”
17 *Bourne Valley*, 832 F.3d at 1156. Specifically, the Court of Appeals found that by enacting the
18 statute, the legislature acted to adversely affect the property interests of mortgage lenders, and
19 was thus required to provide “notice reasonably calculated, under all circumstances, to apprise
20 interested parties of the pendency of the action and afford them an opportunity to present their
21 objections.” *Id.* at 1159. The statute’s opt-in notice provisions therefore violated the Fourteenth
22 Amendment’s Due Process Clause because they impermissibly “shifted the burden of ensuring
23 adequate notice from the foreclosing homeowners’ association to a mortgage lender.” *Id.*

24 The necessary implication of the Ninth Circuit’s opinion in *Bourne Valley* is that the
25 petitioner succeeded in showing that no set of circumstances exists under which the opt-in

1 notice provisions of NRS § 116.3116 would pass constitutional muster. *See, e.g., United States*
2 *v. Salerno*, 481 U.S. 739, 745 (1987) (“A facial challenge to a legislative Act is, of course, the
3 most difficult challenge to mount successfully, since the challenger must establish that no set of
4 circumstances exists under which the Act would be valid.”); *William Jefferson & Co. v. Bd. of*
5 *Assessment & Appeals No. 3 ex rel. Orange Cty.*, 695 F.3d 960, 963 (9th Cir. 2012) (applying
6 *Salerno* to facial procedural due process challenge under the Fourteenth Amendment). The fact
7 that a statute “might operate unconstitutionally under some conceivable set of circumstances is
8 insufficient to render it wholly invalid.” *Salerno*, 481 U.S. at 745. To put it slightly differently,
9 if there were any conceivable set of circumstances where the application of a statute would not
10 violate the constitution, then a facial challenge to the statute would necessarily fail. *See, e.g.,*
11 *United States v. Inzunza*, 638 F.3d 1006, 1019 (9th Cir. 2011) (holding that a facial challenge to
12 a statute necessarily fails if an as-applied challenge has failed because the plaintiff must
13 “establish that no set of circumstances exists under which the [statute] would be valid”).

14 Here, the Ninth Circuit expressly invalidated the “opt-in notice scheme” of NRS
15 § 116.3116, which it pinpointed in NRS 116.3116(2). *Bourne Valley*, 832 F.3d at 1158. In
16 addition, this Court understands *Bourne Valley* also to invalidate NRS 116.311635(1)(b)(2),
17 which also provides for opt-in notice to interested third parties. According to the Ninth Circuit,
18 therefore, these provisions are unconstitutional in each and every application; no conceivable
19 set of circumstances exists under which the provisions would be valid. The factual
20 particularities surrounding the foreclosure notices in this case—which would be of paramount
21 importance in an as-applied challenge—cannot save the facially unconstitutional statutory
22 provisions. In fact, it bears noting that in *Bourne Valley*, the Ninth Circuit indicated that the
23 petitioner had not shown that it did not receive notice of the impending foreclosure sale. Thus,
24 the Ninth Circuit declared the statute’s provisions facially unconstitutional notwithstanding the
25 possibility that the petitioner may have had actual notice of the sale.

1 Accordingly, the HOA foreclosed under a facially unconstitutional notice scheme, and
2 thus the HOA foreclosure cannot have extinguished the DOT. Therefore, the Court must quiet
3 title as a matter of law in favor of Plaintiff as assignee of the DOT.

4 **B. Plaintiff's Remaining Claims for Violation of NRS § 116.1113, Injunctive**
5 **Relief, and Violation of Procedural Due Process**

6 In its prayer for relief, Plaintiff requests primarily a declaration that Underwood and NV
7 Eagles purchased the Property subject to its DOT. (*See* Am. Compl. 14:13–14). The other
8 relief requested—with the exception of the injunctive relief—is phrased in the alternative. (*See*
9 *id.* 14:15–26). Therefore, because the Court grants summary judgment for Plaintiff on its quiet
10 title claim, Plaintiff has received the relief it requested. Accordingly, the Court dismisses
11 Plaintiff's second and fourth causes of action as moot.

12 With regard to Plaintiff's request for a preliminary injunction pending a determination
13 by the Court concerning the parties' respective rights and interests, the Court's grant of
14 summary judgment for Plaintiff moots this claim, and it is therefore dismissed.

15 **III. CONCLUSION**

16 **IT IS HEREBY ORDERED** that Plaintiff's Motion for Summary Judgment, (ECF No.
17 106), is **GRANTED** pursuant to the foregoing.

18 **IT IS FURTHER ORDERED** that HOA's Motion to Dismiss, (ECF No. 88), is
19 **DENIED**.

20 **IT IS FURTHER ORDERED** that NV Eagles's Motion for Summary Judgment, (ECF
21 No. 92), is **DENIED**.

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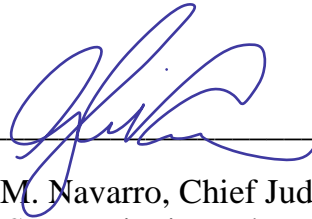
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1 **IT IS FURTHER ORDERED** that Plaintiff's remaining claims are **DISMISSED with**
2 **prejudice.**

3 The Clerk of Court is ordered to close the case.

4 **DATED** this 22 day of May, 2018.

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Gloria M. Navarro, Chief Judge
United States District Judge